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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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NO. 76-5606

* * *

LOUIS C. ACKER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

* * *

ON APPEAL FROM THE COUNTY COURT AT LAW

NUMBER TWO, TRAVIS COUNTY, TEXAS

* * *

APPELLEE'S MOTION TO DISMISS OR AFFIRM

* * *

March 11, 1977

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Austin, Texas 78701

INDEX

	PAGE
TABLE OF CITATIONS	
MOTION TO DISMISS OR AFFIRM	1
APPENDIX	7

TABLE OF CITATIONS

CASES	PAGE
Cohen v California, 403 U.S. 15 (1971)	2
Gooding v Wilson, 405 U.S. 518 (1972)	4
Lewis v City of New Orleans, 415 U.S. 130 (1974)	4
Mittelstaedt, Ex Parte, 164 TEX. CRIM. 115, 297 S.W.2d 153 (1957)	2
Rosenfield v New Jersey, 408 U.S. 901 (1972)	4
Wilbur, Ex Parte, 155 TEX. CRIM. 21, 230 S.W.2d 540 (1950)	2

STATUTES

28 U.S.C. § 1257(2)	1
TEX. CODE CRIM. PROC. ANN. § 4.03 (1966)	3

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, respectfully moves this Honorable Court to dismiss the above entitled appeal, or in the alternative to affirm the judgment of the County Court on the ground that there is no jurisdiction.

I.

Appellant, Louis C. Acker, has claimed that jurisdiction in the United States Supreme Court exists by virture of 28 U.S.C. § 1257(2). The Appellee, the State of Texas, respectfully suggests that jurisdiction cannot lie in the United States Supreme Court by virtue of 28 U.S.C. § 1257(2).

The first sentence of 28 U.S.C. § 1257(2) provides that, "Final judgments or decrees rendered by the highest court of a

state in which a decision could be had,...". One of the cases cited by Appellant states that as a requirement for such jurisdiction, the decision must be by the highest state court in which review may be had. Cohen v California, 403 U.S. 15 (1971) This requirement has not been met.

Appellant has an available method by which the issues presented to the United States Supreme Court in Appellant's brief may be submitted for review by higher state courts. Appellant may attack the constitutionality of laws following conviction by filing a Writ of Habeas Corpus in the Texas courts.

In Ex Parte Wilbur, 155 TEX. CRIM. 21, 230 S.W.2d 540 (1950) petitioner had been convicted of violation of a city ordinance. The statute involved in the instant case and an ordinance are similar in that original jurisdiction is in a Justice of the Peace Court with an appeal by trial de novo to the County Court. Petitioner Wilbur was fined $25.00 (twenty-five dollars) in the County Court. Petitioner filed a Writ of Habeas Corpus in the District Court wherein relief was denied. Petitioner appealed to the Court of Criminal Appeals wherein relief was granted. Petitioner claimed the ordinance was invalid as an illegal restraint of liberty. The Court of Criminal Appeals found that the ordinance was void.

In Ex Parte Mittelstaedt, 164 TEX. CRIM. 115, 297 S.W.2d 153 (1957), Petitioner followed an identical route to the Court of Criminal Appeals to obtain relief. Petitioner was convicted of loitering within 250 feet of a school under a city ordinance. The Court of Criminal Appeals specifically said that jurisdiction in the Court of Criminal Appeals lies to determine whether an ordinance is void through a Writ of Habeas Corpus. If the statute involved in the case at bar is unconstitutional under the First Amendment of the United States Constitution, it would be a void law. It should

be noticed that both of the above cited cases involved restraints upon personal liberty, though not for free speech, similar to the claims made by Appellant in the case at bar. Copies of these two cases are included in the appendix to this motion.

At the time the decisions were rendered in both of the above cited cases, direct appeals from the County Court to the Court of Criminal Appeals required a fine of at least $100.00 (one hundred dollars). Commentary TEX. CODE CRIM. PROC. ANN. § 4.03 (1966) That is the present rule which controls direct appeal in the case at bar.

II.

This Court should decline to rule because of Appellant's failure to seek review in the higher courts of Texas. On page 3 of his Jurisdictional Statement, Appellant states that the County Court:

> "even though aware of the substantial nature of the constitutional questions presented, the lack of any interpretation of this statute by the Texas Court of Criminal Appeals and the desire of the Appellant to such review on appeal (as reflected by his request that the Court fine him in excess of one hundred dollars) nevertheless chose to become the highest available court in the state to uphold the applied validity of this criminal statute in the face of challenges that it was repugnant to the United States Constitution."

Appellee suggests that the record does not reveal a request by Appellant to be sentenced in excess of $100.00 (one hundred dollars). The transcript of the proceeding on August 2, 1976 reveals that Appellee recommended a fine of $75.00 (seventy-five dollars). Appellant at that time did not make an objection nor did he request a fine in excess of $100.00 (one hundred dollars). The Court accordingly assessed a punishment of a fine of $75.00 (seventy-five dollars). The transcript of the sentencing is included in the appendix.

In addition, a letter from the trial judge to attorneys for both Appellant and Appellee indicates that the trial judge herself offered to sentence Appellant in excess of $100.00 (one hundred dollars) to allow an appeal to Texas' highest court. The trial judge recognized the need for the State's highest court to interpret the statute in question. In her letter the trial judge stated that she would be willing to sentence in excess of the minimum amount required for appeal

> "so that if defendant is planning to raise constitutional issues, appeal can lie to the Court of Criminal Appeals to enable it to make an authoritative interpretation of the statute and also pass upon its constitutionality as interpreted." The letter is included in the appendix.

Appellant, therefore, failed to seek an appeal to the highest court in Texas. Appellant should not be allowed to come to this Court to seek review of a statute which properly could have been reviewed in the Texas Court of Criminal Appeals.

III.

The Supreme Court should decline to hear this case even if the Court determines that it has jurisdiction. In Gooding v Wilson, 405 U.S. 518 (1972) the Court said that it lacked jurisdiction to authoritatively construe state legislation. That case established the rule that the state statutes should first be construed by the state courts before the United States Supreme Court will rule on the constitutionality of the statute. This rule was followed in Rosenfield v New Jersey, 408 U.S. 901 (1972) and in Lewis v City of New Orleans, 415 U.S. 130 (1974).

This is a particularly appropriate case in which to apply that rule. The questions certified by Appellant establish that a ruling by this Court would have the very narrow application to only himself or any person who used identical language. Appellant in his Jurisdictional Statement at page 12 suggests that the Court

should call for briefs and oral argument in order to build an analytical model for application of abusive language statutes. The issues actually before the Court would not allow this case to be used to develop such a model. Even if that were true, the states should be given an opportunity to develop a model.

CONCLUSION

For the foregoing reasons the Court should grant Appellant's motion to dismiss this appeal, or in the alternative, to affirm the judgment entered by the County Court.

Respectfully submitted,

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